No. 340.

Brf. of Atty. Gen.l (Richards & Boyd) for U.S.

Filed Oct. 18, 1897.

Office Supreme Court, U. S.
FILED
JAMES H. MCKENNEY
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THOMAS W. BRAM, OTHERWISE CALLED Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, plaintiff in error,
v.
THE UNITED STATES.
No. 340.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

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Assistant Attorney-General.
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STATEMENT.

Plaintiff in error was indicted for the murder of Charles I. Nash, who was killed on the 14th day of July, 1896, on board a vessel of the United States called the *Herbert Fuller*, said vessel being upon the high seas within the admiralty and maritime jurisdiction of the United States

and out of the jurisdiction of any particular State. (Rec., p. 3.) He was tried, found guilty, and sentenced to be hanged. (Rec., pp. 18, 126.)

The bill of exceptions contains the following narrative of the homicide (Rec., pp. 21–23):

> Be it remembered, that the barkentine *Herbert Fuller* sailed from Boston on the 2d day of July, 1896, bound for Rosario, on the River Platte above Buenos Ayres, South America, with a cargo of lumber under and on deck.
>
> She had on board a captain, Charles I. Nash; Bram, the defendant; a second mate, August W. Blomberg; a steward and six seamen; also the captain's wife, Laura A. Nash, and one passenger, Lester H. Monks.
>
> The vessel proceeded on her course toward her port of destination until the night between July 13 and July 14. On that night at 12 o'clock the second mate's watch was relieved by the mate's watch, of which Bram, the defendant, was the officer in charge. The captain, his wife, the passenger, Monks, and the first mate and the second mate all lived in the aftercabin, occupying separate rooms. A draft of the aftercabin is annexed as part of this statement of facts. The crew and the steward slept forward in the forward house.
>
> When the watch was changed at midnight, Bram, the defendant, took the deck, the seamen, Loheac and Perdok, went forward on the lookout, and Charles Brown, otherwise called Justus Leopold Westerberg, his true name, took the wheel, where it was his duty to remain till 2 o'clock, at about which time he was relieved by Loheac. The second mate went to his room and the seamen of his watch to their quarters at 12 midnight, and there was no evidence that any

of them or the steward appeared again till daylight.

The passenger, Monks, who occupied a room on the starboard side of the cabin between the chart room, where the captain slept, and the room on the forward starboard side where Mrs. Nash slept, with doors opening from the passenger's room into both the chart room used by the captain as his room and that of Mrs. Nash, was aroused not far from 2 o'clock—the exact time is not known, as he says—by a scream and by another sound characterized by him as a gurgling sound. He arose, went to the captain's room, and found the captain's cot overturned and the captain lying on the floor by it. He spoke, but got no answer; put his hand on the captain's body and found it damp or wet. He then went to Mrs. Nash's room; did not see her, but saw dark spots on her bedding and suspected something wrong. He went on deck and called the mate, the defendant, telling him the captain was killed. Both went below, took down the lantern hanging in the main cabin, burning dimly, turned it up and went through the captain's room to the passenger's room, and the passenger there put on a shirt and pantaloons. They then both returned to the deck, the mate on the way stopping a brief time in his own room. Bram and Monks remained talking on deck till about daybreak, when the steward was called and told what had happened. Up to this time no call had been made for the second mate, nor had anyone visited his room. Later it was found that Captain Nash, his wife, and Blomberg, the second mate, were all dead, each with several wounds upon the head, apparently given with a sharp instrument like an ax, penetrating the skull and into the substance of the brain, and the second mate lying on his back with his feet crossed, in his berth; Mrs. Nash in her

bed, in her room, and at the back side of the bed, and Captain Nash in his room, as already stated.

The whole crew was called at or about daylight and was informed of the deaths.

The bodies were removed from the cabin and placed in the jolly-boat, and the boat was towed astern to Halifax. The cabin was then locked, Bram taking the keys, and it remained locked till the vessel reached Halifax.

At first, after the discovery of the murders, there was some hesitancy as to where the vessel should go. At the defendant's suggestion she was headed to go to Cayenne, in French Guiana, but the plan was changed and she steered for Halifax, Nova Scotia, where she arrived July 21, and was taken possession of by the local authorities at the instance of the consul-general of the United States.

At first, after the discovery of the murders, Bram, on whom had devolved the command of the ship, made Brown chief mate and Lobeae second mate.

No blood or spots of blood were ever discovered on the person or the clothing of any person on board, nor did anything direct suspicion to anyone.

In a day or two, suspicion having been excited in respect to the seaman Brown, the crew, under the supervision of Bram, seized him, he not resisting, and put him in irons. All the while the officers and seamen remained on deck. Bram navigated the ship until Sunday before they reached Halifax on Tuesday, and after the land of Nova Scotia was in sight, when, Brown having stated to his shipmates, or some of them, that he saw into the cabin through a window in the afterpart and on the starboard side of the house, and saw Bram, the mate, kill the captain. In consequence of this statement of Brown, the crew, led by the steward, suddenly

overpowered the mate and put him in irons, he making no resistance, but declaring his innocence. Bram and Brown were both carried into Halifax in irons.

At Halifax all the officers, the crew, and the passenger were examined before the American consul and gave their statements, which were reduced to writing and sworn to.

All were kept in confinement at Halifax, and Bram was brought before one Powers, a local official detective, and was searched by him and conversation was had with him.

Subsequently the crew, including Bram and Brown, and the passenger, Monks, at the request of the United States authorities, were sent by steamer direct from Halifax to Boston, and there delivered to the authorities, who lodged them all in jail.

Upon complaint of the United States district attorney, and hearing thereon before a commissioner of the United States circuit court, Bram and Brown were committed to await the action of the grand jury, and all the witnesses except Monks, the passenger, and Spencer, the steward, were restrained in jail, being unable to furnish bail.

When the grand jury were in attendance Brown was called as a witness before them. Bram did not testify before the grand jury.

Bills of indictment were returned against Bram for the murders of Captain Nash, Mrs. Nash, and the second mate, Blomberg.

No indictment was found against Brown.

POINTS AND ARGUMENT.

I.

FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR.

The first assignment of error is as follows:

> The court erred in overruling the defendant's plea in abatement. (Substituted assignment of errors, p. 1.)

The following are the grounds of the plea in abatement:

> 1. Because certain of the grand jurors who found and returned said indictment were not duly sworn before they considered the evidence against said defendant and returned said indictment into court.
>
> 2. Because certain of the said grand jurors who acted upon the evidence against the said defendant objected and refused to being sworn, but affirmed.
>
> 3. The indictment omits to allege that the same was found and presented upon the oath and affirmation of said grand jurors. (Rec., p. 30.)

The second assignment of error is that—

> The court erred in overruling the defendant's supplemental plea in abatement. (Substituted assignment of errors, p. 1.)

The grounds of defendant's supplemental plea in abatement are as follows:

> Because one of the grand jurors who found and returned said indictment was not duly sworn before said grand jurors considered the evidence against said defendant and returned said indictment into court; and
>
> Because one of the grand jurors who found and returned said indictment was permitted to affirm,

> instead of being sworn, without stating and without being asked as to the fact that he was conscientiously scrupulous of being sworn. (Rec., p. 30.)

The following is the third assignment of error:

> The court erred in refusing to rule that one of the grand jurors (Merrill) was not duly sworn before the grand jury considered the evidence against said defendant and returned the indictment into court. (Substituted assignment of errors, p. 1.)

In *Commonwealth* v. *Smith* (9 Mass., 107, 109), the defendant filed a plea in abatement, on the ground that one of the grand jurors was a Quaker and did not take the oath required by the laws and statutes of the Commonwealth, and therefore was not qualified to act as a grand juror.

The court held that the statute providing that Quakers, when they can not conscientiously take the oath prescribed by law, are to be allowed to make affirmation; such affirmation is equivalent to the oath appointed to be taken by other persons.

The court further held:

> Objections to the personal qualifications of the jurors, or to the legality of the returns, are to be made before the indictment is found; and may be received from any person who is under a presentment for any crime whatsoever; or from any person present, who may make the suggestion as *amicus curiæ*.

Attention is called to the fact that no objection is made to any of the grand jury except Merrill. All the other members of the body are thereby admitted to be duly

qualified. Then, if the objection to Merrill is untenable, the plea in abatement was properly overruled.

Section 800 of the Revised Statutes is as follows:

> Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such State court, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and impaneling of juries in substance to the laws and usages relating to jurors in the State courts, from time to time in force in such State. This section shall not apply to juries to serve in the courts of the United States in Pennsylvania.

The Public Statutes of Massachusetts, 1882, chap. 213, sec. 5 and 6 (p. 1196), provide:

> SEC. 5. The clerk of the court shall prepare an alphabetical list of the names of all persons returned as grand jurors, and, when they are to be impaneled, the two persons first named thereon shall be first called, and the following oath shall be administered to them:
>
> "You, as grand jurors of this inquest for the body of this county of ———, do solemnly swear that you will diligently inquire, and true presentment make, of all such matters and things as shall

be given you in charge; the Commonwealth's counsel, your fellows', and your own you shall keep secret; you shall present no man for envy, hatred, or malice, neither shall you leave any man unpresented for love, fear, favor, affection, or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding. So help you God."

The other jurors shall then be called in such divisions as the court may deem proper, and the following oath shall be administered to them:

"The same oath which your fellows have taken on their part, you and each of you on your behalf shall well and truly observe and keep. So help you God."

SEC. 6. When a person returned as grand juror is conscientiously scrupulous of taking the oath before prescribed, he shall be allowed to make affirmation, substituting the word "affirm" instead of the word "swear," and also the words "this you do under the pains and penalties of perjury," instead of the words "so help you God."

Idem, chapter 3, section 3 (p. 58), provides:

In the construction of statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general court or repugnant to the context of the same statute; that is to say, * * * Fourteenth, The word "oath" shall include "affirmation" in cases where, by law, an affirmation may be substituted for an oath.

Whether or not a juror is entitled to affirm instead of being sworn is a matter to be passed upon by the court at the time, and the action of the court in this respect is not reviewable; especially in the absence of a finding

of facts, upon which the appellate court could hold the contrary, the presumption is that the person taking the affirmation was properly qualified to take this form of obligation.

The learned judge in the court below, in passing upon the plea in abatement, said:

> The section of the statutes of Massachusetts which says, "Persons having conscientious scruples may be allowed to affirm instead of taking an oath" provides no way by which the court can determine the question of his conscientious scruples. It must depend upon his own assertion. We know of no way by which the conscience can be searched by evidence to contradict the statement he himself makes in regard to his scruples. * * * The party has the discretion to declare his scruples, and as to the privilege the court has nothing to do but to allow it under the statute.

(*Horne* v. *Haverhill*, 113 Mass., 344; *State* v. *Adams*, 78 Me., 486. See also *Com.* v. *Brown*, 121 Mass., 69.)

The record shows that Merrill was duly affirmed. (See Entry Record, p. 2, October term, 1896.)

> All of said grand jurors being impaneled as aforesaid were duly sworn except grand juror William Merrill, junior, of West Newbury, who *duly affirmed*, twenty-one grand jurors being in attendance.

II.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR.

The fourth assignment of error is as follows:

> The court erred in holding that two or more counts in said indictment referring to the same transactions

> or occurrences might properly be joined without an averment that they referred to the same transactions or occurrences. (Substituted assignment of errors, p. 1.)

The only thing in the record upon which this assignment can be based is the third ground of defendant's motion to quash, which reads as follows:

> Because different counts are improperly joined or included in same indictment. (Rec., p. 31.)

Section 1024, Revised Statutes, reads thus:

> When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases the court may order them to be consolidated.

An examination of averments in the indictment and the facts in the case shows that the crimes or offenses were of the same class and were connected together. All happened within a short period of time within the narrow space of a small vessel on the high seas. As will be seen, all the counts relating to Laura R. and Laura A. Nash were nol-prossed before the trial began. Plaintiff in error was tried and convicted on the first two counts charging the killing of Charles I. Nash; the first with an instrument to the jurors unknown, the second with an ax. (*United States* v. *Peterson*, 1 Wood & M., 305; *United States* v. *Pirates*, 5 Wheat., 184 (201);

United States v. *Pointer*, 151 U. S., 396 402; *McElroy* v. *United States*, 164 U. S., 76.)

The motion to quash will be treated of under the fifth assignment.

The fifth assignment of error is as follows:

> The court erred in overruling the defendant's motion to quash. (Substituted assignment of errors, p. 1.)

Such a motion is ordinarily addressed to the discretion of the court, and a refusal to quash is not generally assignable for error. (*United States* v. *Rosenburgh*, 7 Wall., 580, 583.)

In this case the court says:

> The rule laid down by the elementary writers is that "a motion to quash is addressed to the sound discretion of the court, and, if refused, is not a proper subject of exception."
>
> When made in behalf of defendants, it is usually refused, unless in the clearest cases, and the grounds of it are left to be availed of, if available, upon demurrer or motion in arrest of judgment.

See also *United States* v. *Hamilton*, 109 U. S., 63; *Logan* v. *United States*, 144 U. S., 263, 282; *Durland* v. *United States*, 161 U. S., 306, 314.

III.

SIXTH, SEVENTH, EIGHTH, NINTH, AND TENTH ASSIGNMENTS OF ERROR.

The sixth assignment of error is as follows:

> The court erred in overruling the defendant's challenge to the array. (Substituted assignment, of error, p. 1.)

The challenge to the array is as follows:

And now comes Thomas M. Bram, the defendant named in said indictment, in his proper person, when the jury is about to be empaneled to try the issue in said indictment, and says that the said array is an illegal one, and that the order of this honorable court in reference to the drawing and apportioning of jurors for the trial of this case from different cities and towns in the district of this court in accordance with the provisions of section 802 of the Revised Statutes of the United States has not been complied with, but has been evaded.

That at a session of this court on the 14th day of November, 1896, the district attorney for the United States for said district moved, in the presence of the defendant, in open court, that a special panel consisting of one hundred jurors be drawn, from which jurors were to be selected to try the defendant of the offense charged in said indictment. That the defendant, by his counsel, in open court assented to the said motion of the district attorney. Thereupon, on the 17th day of November, 1896, it was ordered by the court that venires issue for one hundred additional jurors to come in on Monday, the 14th day of December, 1896, at 10 o'clock in the forenoon, from the several cities and towns named in Table No. 50, and apportioned as follows, viz:

Boston, sixteen; Adams, nine; Cambridge, fourteen; Woburn, thirteen; Nantucket, nine; Hyde Park, nine; Chatham, nine; Stoneham, nine; West Newbury, nine; Plainfield, three.

That the defendant expected that this order of the court would be complied with. That he is advised it was his right, and he desired and still desires to be tried by a jury drawn pursuant to that order. That it now appears by the list of jurors

presented to the defendant that the apportionment materially differs from said order of the court, and that by said present list the jurors are unjustly and against the interest of the defendant apportioned, as follows, viz:

Boston, seventeen; Adams, eleven; Cambridge, two; Woburn, twelve; Nantucket, nine; Hyde Park, nine; Chatham, eleven; Stoneham, ten; West Newbury, twelve; Plainfield, four.

That the apportionment on said list now before the defendant is contrary to the order of this court and in violation of section 802 of the Revised Statutes.

First. Because no jurors were drawn from the city of Cambridge under said order of this honorable court of November 17, 1896. That a larger number of jurors appears upon the list now before the defendant from the towns of Chatham, West Newbury, Plainfield, Stoneham, and Adams than was stated or authorized in said order of November 17.

Second. Because the following-named persons upon said list, to wit, Solomon C. Atwood, Theophile Brodeur, Martin Best, T. Weston Bryant, George O. Baird, Elijah Ball, Oliver J. Briggs, James N. Benjamin, James Buckley, Albert Brown, Oliver E. Eldridge, Nelson A. Newhall, Parker H. Nason, and Arthur A. Norcross, have been summoned and have discharged duties as jurors in this court within less than one year of the time assigned for the trial of the defendant, and were not drawn or summoned to attend this special sitting of this court, pursuant to said order of November 17, 1896.

Third. Because the fourteen jurors last named were without right and without the knowledge and consent of the defendant substituted for the fourteen persons which this court by its order of November

17 ordered to have drawn and returned from the city of Cambridge, and the defendant now objects to such substitution as a violation of his legal rights.

Fourth. Because the list of jurors now presented to the defendant contains the names of persons not residing within the several cities and towns named in Table No. 50, and in said order of this court, dated November 17, 1896.

Fifth. That a meeting of the board of aldermen of said city of Cambridge was called for Monday, the 7th day of this month, for the purpose of drawing jurors pursuant to said order of this court. That on said 7th day of December, after notice had issued for said meeting of the board of aldermen of said Cambridge, and before the arrival of the hour for which said meeting had been called, an official of the United States notified the clerk of said city of Cambridge that it would not be necessary to hold said meeting, as no jurors would be needed from said Cambridge, and consequently none were drawn from that city.

Sixth. Because the venires on which said jurors were drawn were not properly served or by persons qualified to serve the same. (Rec., pp. 36–38.)

The seventh, eighth, and ninth assignments of error are as follows:

Seventh. The court erred in holding that the defendant's objection to the apportionment of jurors was not well taken.

Eighth. The court erred in ruling that the neglect of the constable of Cambridge, to whom was committed the venire, regularly issued under the seal of this court, was no ground for challenging the array.

Ninth. The court erred in ruling that the venires had been properly served, except that which ran to

Cambridge; that the challenge to the array could not be supported; and that the jurors had been legally and properly drawn, summoned, and returned, and were fit to be empaneled to try the case. (Substituted assignment of errors, p. 1.)

The tenth assignment is as follows:

The court erred in ruling that the jurors mentioned in the order of Judge Aldrich were as regularly summoned and attending as those who had been summoned pursuant to the venires ordered on the seventeenth day of November. (Substituted assignment of errors, p. 1.)

Assignments of error from 6 to 10, inclusive (substituted assignments of error, p. 1), as will be seen, are all based on the challenge to the array, for the jurors mentioned in the order of Judge Aldrich are the same as those named in paragraph 2 of the challenge to the array. (See pp. 14 and 38 of Record.) (The rulings of the court on exception referred to in above assignment will be found on p. 40 of the Record.) The challenge to the array is made because some of the one hundred jurors asked for in addition to those already in attendance in court were, in fact, by a mistake of the constable, not summoned.

The act of September 24, 1789, chapter 20, section 29, and act of May 30, 1800, chapter 61, adopted State practice for courts of the United States in summoning jurors.

The act of July 20, 1840, chapter 47, reenacts these, and the whole of them are practically reenacted in sections 800, 802, and 803 of Revised Statutes of the United States.

The present provision is the act of June 30, 1879, chapter 52, section 2, 21 Stat. L., 43 (1 Supp., 270), which is in the alternative, permitting an order that jurors be drawn from the boxes used by the State authorities in selecting jurors in the highest courts of the State.

Section 1 of this act contains provisions for jurors in in all circuit and district courts. The amendment to this act by act of August 8, 1888, chapter 785, is unimportant in considering this case.

The Massachusetts statutes relating to selecting jurors are:

P. S., ch. 170, towns, sec. 6–12, 17–22.
Cities other than Boston, sec. 23–25, acts 1894, ch. 514.
Boston, acts 1888, ch. 123.
Additional venires, sec. 13.

The Massachusetts practice and the above United States acts are clearly set forth in—

United States v. *Richardson*, 28 F. R., 61, 1886, (C. C. Maine,) Gray, J.

This case decides that a United States venire may be issued to and served by a constable, and that Congress has recognized this by the acts respecting marshals' fees for summoning jurors drawn by constables, viz:

Act May 8, 1792, ch. 36.
Act February 28, 1799, ch. 80.
Act February 28, 1853, ch. 80.
U. S. Rev. Stat., sec. 829.

A failure of a constable to make due service of one of the subordinate venires is not ground for challenge to the array, because it does not affect the whole panel.

Com. v. *Walsh*, 124 Mass. 32.
United States v. *Richardson, supra.*

The latter is cited and followed in—

Harmon v. *United States*, 43 F. R., 560, 565. C. C. Me., Gray, J.
Harmon v. *United States*, 147 U. S., 268.
Pointer v. *United States*, 151 U. S., 396, 407 (Murder).

The bill of exceptions and record show that the venire directed to one of the constables of Cambridge was outstanding and not served as late as December 12, 1896, and also that it was never served at all, owing to the constable's error.

The court ordered the venires for jurors for the October term, 1896, and the special venires for additional jurors to issue in this case. Mere issuing of the venires by the clerk without express order would have been sufficient. (*United States* v. *Richardson, supra*, citing *United States* v. *Reed*, 2 Blatch., 435; trials of Fries (1799), 44.)

The defendant's objection to the apportionment was not that the jurors originally summoned for the term were not properly apportioned in the order for venires for them, but that the combining of the attending disengaged jurors with the additional jurors summoned made an apportionment different from that contained in either order. As the second order was for *additional* jurors (made in defendant's presence without objection), it required the

apportionment resulting from combining the latter jurors with the former.

In *Com.* v. *Walsh* (124 Mass., 32, 35), Gray, C. J., said:

> A challenge to the array is to the whole body of jurors returned from the county, and appears, at common law, to have been allowed only on account of the partiality or default of the sheriff or other officer who made the return. All the cases referred to by counsel were of that character. If the sheriff returned a juror on the nomination of one of the parties, or knowingly returned a person more favorable to one party than to the other, it showed partiality, or, as it was called, unindifferency, on the part of the sheriff, which was a ground for challenging the array, and consequently could not be a cause of challenge to the polls. So if the sheriff failed to summon a knight, in a case in which the law required a knight to be one of the jury, it showed a default on the part of the sheriff. So if the sheriff, or his bailiff or under officer, for whose acts he was responsible, returned persons who were not within the franchise, it was misconduct in the sheriff, and therefore ground for challenging the whole array. (Co. Lit., 156; 3 Bl. Com., 359; 1 Chit. Crim. Law, 536–539.) If a bailiff returned some of the jurors at the nomination of a party or his prosecutor, it was ground for a challenge to the array if the same bailiff returned the whole array, but not if the array was made by divers bailiffs. (2 Rol. Ab., 641.) If all the jurors were of affinity to a party, it was not a ground of challenge to the array, but only of challenges to the polls. (2 Rol. Ab., 638.)

The court then reviews authorities on this point.

The court further said (pp. 37–38):

> Partiality or misconduct in the issue and transmission of the venires by the sheriff or the clerk of the court might be ground for a challenge to the array, because it would show that there was no legal jury. (*Gardner* v. *Turner*, 9 Johns., 260; *Clinton* v. *Englebrecht*, 13 Wall., 434.) But an objection to the manner of preparing the jury list, or of drawing the jurors, or to the return of the constable in any town or city, does not affect the whole panel, but only the jurors from that town or city, and is therefore not a ground of challenge to the array, but only of challenges to the polls of those jurors. (6 Dane Ab., 535.)

In *The King* v. *Edmunds* (4 B. & Ald., 471, 489) Abbott, C. J., held that the failure of the sheriff to summon one of the gentlemen named in the panel of the special jury was no ground of challenge to the array, it appearing that the inferior officer, whose duty it was to serve the summons, sent it in a very negligent and blamable manner, by a carrier or newsman, instead of taking it himself.

In *State* v. *Housley* (94 N. C., 1021, 1027) Merrimon, J., said:

> Good cause of challenge to the array must be such as in contemplation of law affects adversely and renders ineligible the whole panel, as where the panel had been selected and arrayed by one or more persons, charged to select the jury, who were moved, or probably were moved, by partiality in selecting them, and the like causes. (*State* v. *Murphy*, 1 Winst., 129; *State* v. *Haywood*, 73 N. C., 437;

State v. *Martin*, 82 N. C., 632; *State* v. *Sparks*, 94 N. C., 865.)

In *State* v. *Frazier* (54 Kans., 719, 721) the court overruled a challenge to the array which was based on the ground that the jury was not made up as required by law, because no list of names had been returned from the city of Salina, and therefore no jurors were drawn from Salina. In this case there was no claim that the jurors in attendance on the court were improperly placed on the list or were persons improperly summoned. The sole objection was that the city of Salina ought to have contributed its quota of names to the list from which the jurors were drawn.

In *Schnell* v. *State* (92 Ga., 459) the court held that—

> It is no cause of challenge to the array that twelve out of the eighteen jurors constituting the array had just served as a jury for the trial of another person indicted for a like offense. * * * If the matter of the challenge was good at all it would not set aside the panel, but would be available only by challenges to the polls.

A challenge to the array must be based on objection to all the jurors composing the panel. (*Owens* v. *Stanley*, 34 Ill. App., 338, 339.)

In *State* v. *Hogan* (67 Conn., 581, 582) the defendant interposed a challenge to the array of jurors, for the reason "that for this jury term of this honorable court only four jurors were drawn by the clerk of this court in the presence of the sheriff, or one of his deputies, or otherwise, from a suitable number of jury boxes, or in any other manner."

Andrews, C. J., said (p. 583):

> A challenge to the array of jurors is an objection to the whole panel of jurors at once, and in order to be available it must be for a cause that affects all the jurors alike. (3 Bl. Com., 359; 2 Tidd's Practice, 779.) The challenge here was bad on its face, in that it was for a reason which, by its own terms, did not attach to four of the jurors whom it prayed to have rejected. It was necessarily overruled.

Objections to individuals named in the panel of jurors are not ground of challenge to the array, but such objections, if good, would be available only by challenges to the polls.

> *People* v. *Vincent*, 95 Cal., 425, 426.
> *Jones* v. *State*, 90 Ga., 616, 624.
> *Prince* v. *Com.*, 89 Va., 330.

In the absence of corruption or partiality, a failure on the part of the sheriff to summon several of the persons named in the panel is no ground of challenge to the array. (*State* v. *Stanton*, 118 N. C., 1182.)

In *The King* v. *Edmunds* (4 B. & Ald., 471, 479), Abbott, C. J., said that a challenge to the array "is always grounded upon some matter personal to the officer by whom the jury had been summoned, and their names arrayed or placed in order upon the parchment or panel whereon they are returned, in writing, to the court."

In *O'Connell* v. *The Queen* (11 Clark & F., 155, 247), Lord Chief Justice Tindal said:

> The only ground upon which the challenge to the array is allowed by the English law is the unindifferency or default of the sheriff.

Wharton says:

> Principal challenges to the array are only granted on proof of relationship, partiality, fraud, gross irregularity, or corruption on the part of the officers charged with the selection. (Wharton's Crim. Pl. and Pr., sec. 608.)

To the same effect is *State* v. *Bradley* (48 Conn., 535, 545).

The following points, relied upon by the attorney for the United States in the court below and set forth in his replication to the challenge to the array, are presented here for the consideration of the court, viz:

> First. That the jury in this case was impartially drawn according to the laws of the United States of America.
>
> Second. That said jury was not selected by design, but was drawn impartially.
>
> Third. That a larger number of jurors does not appear upon the list before the defendant from the towns of Chatham, West Newbury, Plainfield, Stoneham, and Adams than was stated and authorized to be drawn from said towns by the orders of the court.
>
> Fourth. That the jurors specially named in the list in specification two in defendant's challenge to the array were regularly summoned as jurors in the court below for the October term thereof, and were liable for service at said term, and were attending said term of the court, and were not engaged in any other trial, and were properly liable to be called as jurors for the trial of said defendant.
>
> Fifth. That the fourteen jurors specially mentioned were not substituted for any other fourteen persons which the court by the order of November

17 ordered to be drawn and returned from the city of Cambridge.

Sixth. That the list of jurors presented to the defendant contained no names of persons not residing within the several cities and towns named in the Table No. 50. (See Rec., p. 39.)

IV.

ELEVENTH AND TWELFTH ASSIGNMENTS OF ERROR.

The eleventh and twelfth assignments of error are as follows:

> 11. The court erred in overruling the challenge for cause to the juror Solomon C. Atwood.
>
> 12. The court erred in overruling the challenge for cause to the juror Martin Best. (Substituted assignment of errors, p. 2.)

These assignments of error are based upon the following:

> Upon the examination of Juror Solomon C. Atwood upon the voir dire the juror testified that he was one of the jurors who had been summoned for the regular term of said court and was still in attendance. The juror was then challenged for the cause that he was not one of those who had been summoned upon the special venires for additional jurors, but was one summoned earlier in the term and had rendered service at an earlier part of the term. It was proved that this juror had not been excused, but was still in attendance. The challenge for cause was overruled and disallowed.
>
> This juror was then peremptorily challenged.
>
> The juror Martin Best was challenged for cause, with the facts relating to him precisely the same as

those relating to Solomon C. Atwood, and this challenge for cause was likewise overruled and disallowed. The defendant excepted, and his exception was allowed.

The juror was then challenged peremptorily.

When the panel was complete, it appeared that the defendant had not exhausted all his peremptory challenges. (Rec., p. 41.)

The challenge for cause to Juror Atwood was on the ground that he was one of the fourteen jurors *unengaged* and still attending, summoned originally for October term, 1896; that he had at said term already served as a juror, and that these fourteen jurors were not properly included in the array.

The original order, made at October term, 1896 (the date of order, November 17, 1896) (Rec., p. 13), was for one hundred additional petit jurors to come on the 14th of December, 1896, and at the same time the court (Judge Aldrich) ordered that the jurors now present not in case No. 473 be excused until Monday, December 14, 1896, at 10 o'clock a. m. (Rec., p. 14.) There were fourteen of these jurors referred to in last order, among whom were Atwood and Best. (Rec., p. 14.)

As the cause of challenge as to both jurors is the same, the assignment as to Atwood only will be discussed.

He was summoned for the whole term, and the adjournment to December 14 was a continuation of the term. Having served in a previous case during the term did not disqualify him.

The cause of challenge is that the juror has been summoned and attended the said court as a juror at any

term of said court held within two years prior to the time of such challenge. (Sec. 812 Rev. Stat., U. S.)

He was properly included, because the order for the one hundred jurors was not for a special jury, but for additional jurors.

The challenge was properly tried by the court. (U. S. Rev. Stat., sec. 819.)

The defendant suffered no prejudice, because he peremptorily challenged juror Atwood, and his peremptory challenges were not exhausted at the time the panel was complete. (*Hopt* v. *Utah*, 120 U. S., 430; *Hayes* v. *Mo.*, 120 U. S., 68.)

Hence there is no manifest error in disallowing the challenge for cause.

Reynolds v. *United States*, 98 U. S., 145, Waite, C. J.

Spies v. *Illinois*, 123 U. S., 131, 180.

Cf. *No. Pac. Ry. Co.* v. *Herbert*, 116 U. S., 646, Field, J.

Right of challenge is not to select but to reject jurors.

Pointer v. *United States*, 151 U. S., 412, Harlan, J.

United States v. *Marchant*, 12 Wheat., 480, 482.

Hayes v. *Missouri*, 120 U. S., 68, 71.

Spies v. *Illinois*, 123 U. S., 168.

It is the custom to follow the State practice as to impaneling jurors; but there are no statutory requirements, and the matter is within the discretion of the court.

Lewis v. *United States*, 146 U. S., 370, Shiras, J.

Pointer v. *United States*, 151 U. S., 396, 407, Harlan, J.

St. Clair v. *United States*, 154 U. S., 134, 147, 148, Harlan, J.

The record shows that the defendant was face to face with the jurors.

Lewis v. *United States*, 146 U. S., 370–375.
Pointer v. *United States*, 151 U. S., 396, 405.

But the record shows that upon the completion of the jury the peremptory challenges of the plaintiff in error had not been exhausted, and if the court erred in ruling upon the cause of challenge no prejudice was done the plaintiff in error in the selection of the jury. "By the weight of authority the defendant can not complain of the erroneous overruling of his challenge for cause, if he afterwards challenged the juror peremptorily without exhausting his peremptory challenges, so that the juror did not serve; or, according to some of the cases, if he could have so peremptorily challenged him. But if, by such a challenge, he exhausted his peremptory challenges before the jury was completed, he is prejudiced, for his peremptory challenges have been thereby diminished, and the error will be ground for a new trial." (Clarke's Crim. Proc., Hornbook Series, Ch. 12, p. 454.) See also *People of the State of New York* v. *Larubia*, 140 N. Y., 87.

ASSIGNMENTS 13 TO 35, INCLUSIVE,

relate to ruling of the court on the admission or rejection of testimony.

As to the admission or exclusion of testimony generally—

It is an accepted principle that great latitude is allowed the judge in the admission and exclusion of testimony,

and unless it is clear that he erred there should be no reversal. Upon this point the following authorities are cited: *Alexander* v. *United States*, 138 U. S., 353; *Holmes* v. *Goldsmith*, 147 U. S., 150; *Moore* v. *United States*, 150 U. S., 57; *Thiede* v. *Utah Territory*, 159 U. S., 510.

In *Moore* v. *United States* it is held that—

> When the tendency of testimony offered in a criminal case is to throw light upon a particular fact or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appears that the testimony has no legitimate bearing upon the question at issue and is calculated to prejudice the accused in the minds of the jurors.

Further—

> When a necessity arises for a resort to circumstantial evidence in a criminal trial, objections on the ground of relevancy are not favored, as the effect of circumstantial facts depends upon their connection with each other, and considerable latitude is allowed on the question of motive.

In delivering the opinion in this case the court say:

> There are many circumstances connected with a trial, the pertinency of which a judge who has listened to the testimony and observed the conduct of the parties and the witnesses is better able to estimate the value of than an appellate court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter.

Now, considering these assignments of error separately:

Error No. 13.—The witness Leahan for the prosecution (Rec., p. 41) was asked by the prosecution. "Will you describe how you found the door between the room marked 'passenger' and the room to the rear of it there?" (The diagram of the vessel was shown to witness.) The question was objected to by defendant's attorney. Objection overruled, and the witness answered, "Yes, sir; it was locked."

Directly afterwards (Rec., p. 42) the court, in the presence of the jury, stated that the ruling admitting the question and answer should be reversed and the jury instructed to disregard the statement of this witness that he found the door locked. The Record (p. 42) shows that this was all said by the court in the presence and hearing of the jury. This was a sufficient withdrawal of the objectionable question and answer.

Error No. 14 is based on the testimony of Nicholas Power. (Rec., p. 42.) Power, a witness for the Government, testified to a conversation with Bram while the latter was in custody at Halifax. The witness was connected with the police department at Halifax and for a number of years had been on the detective force. Bram was brought to the office of the witness by the latter's direction, and while there the alleged conversation took place. Before the witness was permitted to give the conversation he was examined by the court, and, in answer to questions propounded by the court, stated that there was no inducement offered Bram, in

any way, no promise or hope of advantage held out; that nothing was said by way of suggestion to him that he might suffer if he did not speak; that the conversation was entirely voluntary; that there was no influence exerted to persuade Bram one way or the other. Witness was then allowed by the court to give the conversation. (Rec., p. 43.) Under these circumstances, although Bram was in custody and manacled, the law holds his statements to be voluntary and competent as evidence. (*Wilson* v. *United States*, 162 U. S., 613.)

Confessions are not rendered inadmissible by the fact that parties are in custody, provided they are not extorted by inducements or threats. (*Pierce* v. *United States*, 160 U. S., 355.) See also,

Hopt v. *Utah*, 110 U. S., 574.
Com. v. *Sheehan*, 163 Mass., 170.
Com. v. *Morey*, 1 Gray, 461.
Com. v. *Cuffee*, 108 Mass., 285.

And even if there was conflicting evidence as to the circumstances under which a confession is made, it may be left to the jury to decide whether or not the confession was voluntary. (*Wilson* v. *United States*, 162 U. S., 613; *Com.* v. *Preece*, 140 Mass., 276.)

Omission to caution a person making a confession or declaration does not render such confession or declaration incompetent. There are numerous authorities sustaining this position, particularly *Wilson* v. *United States* (162 U. S., 613); *Com.* v. *Robinson* (165 Mass., 426); *Com.* v. *Myers* (160 Mass., 530); *Com.* v. *Smith* (119 Mass., 305).

Error No. 15.—Defendant's counsel asked witness, Power (Rec., p. 44), "What other articles belonging to

the defendant did you take possession of at that time?" Upon objection by the United States attorney, the court excluded the question. Witness was limited in his direct examination to a particular interview. Hence the cross-examination was properly limited to the same matter. (*Phila. and Trenton R. R. Co.* v. *Stimpson*, 14 Pet., 448, 461; *Putnam* v. *United States*, 162 U. S., 707; *Blitz* v. *United States*, 153 U. S., 308.)

There was no prejudice to the defendant by the exclusion of this testimony, because he was warned that he could recall the witness as a part of his case, and he declined to do so. (*Thiede* v. *Territory of Utah*, 159 U. S., 510.)

Error No. 16.—This is based on exception to the testimony of Oscar Anderson, witness for the Government. (Rec., p. 44.)

Error No. 17.—Is based upon the testimony of witness Loheac, for the Government. (Rec., p. 45.)

Error No. 18.—Upon the testimony of witness Slice. (Rec., p. 45.)

Error No. 19.—Upon the testimony of witness Perdok. (Rec., pp. 45–46.)

Error No. 20.—Upon the testimony of witness Perdok. (Rec., p. 46.)

Error No. 21.—Upon the testimony of witness Wassen. (Rec., p. 46.)

These witnesses were all expert sailors, had been seafaring men for many years, and were ascertained to be from experience familiar with vessels and their workings, and, as such, they were interrogated severally as set

forth in the record with a view to ascertaining the effect of certain conditions in and about the wheel upon the action and course of the vessel. That they were qualified to give an opinion in this respect is indisputable.

Now as to the pertinency of such an inquiry:

Upon a review of all the facts and circumstances connected with this case, there is no reasonable conclusion save that either Bram, the defendant, or Charley Brown, the sailor at the wheel, committed the murders on board the *Herbert Fuller* on the night of the 14th of July, 1896. There is no hypothesis based upon reason which points to the guilt of any other person. Consequently, the testimony which proved or tended to prove that Charley Brown did not or could not commit the murders was competent as tending to prove the guilt of Bram. The defendant contended that Charley Brown had equal opportunity with the defendant to commit the crimes. (Rec., p. 46.) In support of this contention the defendant introduced evidence tending to show that under the conditions existing at the time of the murders it would have been possible for Brown to leave the wheel lashed for a sufficient period to enable him to commit the murders. Hence, the hypothetical questions propounded by the Government were relevant. The Government could properly ask questions showing the impossibility of any person other than the defendant committing the murders. The object of these questions was to show that Brown could not leave the wheel where he was stationed, and it was not only competent in this view but it was competent in the further view to show that Brown did not leave the wheel. (*Neal* v. *State*, 32 Nebr., 120.)

The questions called for facts in the knowledge of the witnesses. The witnesses were qualified experts, and the hypothetical facts involved in the questions were all based on evidence set out in the bill of exceptions.

The contention of the plaintiff in error that at the time of the introduction of this testimony by the Government the theory of the defense had not been suggested is misleading, because the witnesses up to that time introduced by the Government included Monks, the passenger, and Charley Brown, who was at the wheel on the night of the murders. Brown had testified that while at the wheel he looked in at the window of the aftercabin and saw the defendant strike the captain. It was therefore of great importance for the Government to show as conclusively as possible that Brown was at the wheel at the time of the commission of the murders, and the Government would have the right to do this, whether it was in anticipation of the theory of the defense or not. But it really was not in anticipation of the theory of the defense, because the cross-examination of Monks by defendant's counsel, and also of Charley Brown, clearly indicated that the purpose was to maintain that Brown, and not Bram, committed the murders.

Error No. 22.—This assignment is based on the objection to question to Dr. Frank W. Draper. (Rec., p. 47.)

The question was as follows: "Whether, in your opinion, a man standing at the hip of a recumbent person and striking a place on that person's head and forehead with an ax would necessarily be spattered with or covered with some of the blood."

Dr. Draper was for thirteen years a visiting physician of the Boston City Hospital; since 1878 had been teaching legal medicine in the Harvard Medical School; since 1889, a professor of that department; was in 1877 appointed medical examiner for Suffolk County, and as such had examined 4,680 cases, of which 1,022 had been autopsies. He stated as a fact, based upon his scientific knowledge, that the blood would spurt in the direction from which it would come from the heart, viz, toward the arteries, or in the head toward the top of the head. (Rec., p. 47.) And in answer to the question he said:

> The assailant in such a case would not necessarily receive blood spots upon his person or clothing.

In *Com.* v. *Sturtivant* (117 Mass., 122) it is held that—

> Common observers, having special opportunity for observation, may testify to their opinions as conclusions of fact, although they are not experts, if the subject-matter to which the testimony relates can not be reproduced or described to the jury precisely as it appeared to the witness at the time, and the facts upon which the witness is called to express his opinion are such as men in general are capable of comprehending and understanding.

And further—

> Whether a witness, not an expert, is qualified to express his opinion as a conclusion of fact is to be decided by the judge presiding at the trial.

Witness was competent to testify whether his qualification as an expert resulted from reading and studying alone or from his experience. (*Taylor* v. *Railroad*, 48 N. H., 305, 311; *State* v. *Wood*, 53 N. H., 484, 494; *Pierson* v. *Hoag*, 47 Barb., 243.)

Error No. 23.—Is based upon the remark of the court (Rec., p. 52): "He was making something to be used as evidence—a pure manufacture at that time." That the court here may understand this remark, and how it was elicited from the court below, it is necessary to read the examination of Bram in reference to the papers claimed to be copies of the log book from which Bram desired to refresh his memory. This testimony will be found beginning at record, page 47, and ending at record, page 52.

It will be seen that the papers referred to were not the original log book, but were entries that Bram undertook to make as a duplicate, days after the events to be entered therein had taken place, and Bram assigned as a reason for making this pretended duplicate that he thought when the ship sailed from whatever port she might make she might carry away that log book, and he wished this duplicate to show what took place on board the vessel. He stated, further, that he wanted the duplicates to bring ashore to show in case the ship went away with the original log book. Bram stated on his examination that there were many differences between the log book and the so-called duplicates. (Rec., p. 51.)

On Record, page 50, Bram admitted that the pretended duplicates were practically guesswork. In answer to a question by the court as to how he, Bram, got information necessary to enter in his log what happened on deck while the second mate had command and he, Bram, was below, Bram said: "Well, I am sorry to say that we was not particular about making errors;" and when informed by the court that the answer was not to the

question asked, Bram stated that he had no information whatever—that there was none; and when asked if his log book was presumed to cover any of the time when the second mate had command of the deck, and he, Bram, was below, Bram answered, "No, sir." (Rec., p. 50.)

So it will be seen that Bram, by his own testimony, admitted that the pretended log books or duplicates, with which he desired to refresh his memory for the purpose of testifying in this trial, were composed of entries and writings made by Bram himself in the absence of the log book of the ship, sometime after the occurrences which they purported to recite, without regard to the log book previously kept, and constructed by Bram (for his own purpose) to be used, as stated by him, on shore, in the absence of the log book. These duplicates, as further admitted by Bram, were based upon no particular data and it was not even claimed by him that at the time he made the duplicates he had in memory the incidents which his entries pretended to refer to. In other words, the entries upon these duplicates, according to Bram's own testimony, were a pure manufacture at the time he made them; and his testimony is further to the effect that he intended to show them when he came on shore as a statement of the incidents connected with the voyage of the vessel. The judge's remark, under these circumstances, was nothing more than what was apparent, and the comment made by the court was fully justified by the facts and circumstances attending the effort to bring these duplicates to the attention of the court and the jury in this trial.

But, aside from this, the court may express its opinion on part, or even on the whole, of the case if it expressly leaves the facts to the jury. (*United States* v. *Philadelphia and Reading R. R.*, 123 U. S., 113.)

In this case the court (Mr. Justice Gray delivering the opinion) say:

> Trial by jury in the courts of the United States is a trial presided over by a judge, with authority not only to rule upon objections to evidence and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination.
>
> *Vicksburg and Meridian Railroad* v. *Putnam*, 118 U. S., 545.
>
> *St. Louis, etc., Railway* v. *Vickers*, 122 U. S., 360.
>
> *Doyle* v. *Union Pacific Railway Co.*, 147 U. S., 413.

It is decided in this case that—

> It is not reversible error in a judge of a Federal court to express his own opinion of the facts if the rules of law are correctly laid down and if the jurors are given to understand that they are not bound by such expressions of opinion.
>
> *Simmons* v. *United States*, 142 U. S., 148.

The extract from the charge to the jury (Rec., p. 59) is as follows:

> You are not to be affected by any supposed indication of an opinion of the court, or if an opinion had been directly expressed to you by the court you

would have no authority to accept it in substitution for your own independent, original, careful determination on the matters yourselves.

This extract shows that all the facts were expressly left to the judgment of the jury. Further, the remark was expressly stricken out at the time attention was called to it; hence, there was no prejudice to the defendant and no exception could be taken to it.

Lewis v. *United States*, 146 U. S., 370.
Cf. United States v. *Wilson*, 69 F. R., 588.

There was no exception taken to the language of the court at the time. (Rec., p. 52.) No objection was made when the words were first used. (Rec., p. 52.) And even if there had been, objection is not exception.

Alexander v. *United States*, 138 U. S., 353.
Lindsay v. *Burgess*, 156 U. S., 208.
Newport News and Miss. Valley Co. v. *Pace*, 158 U. S., 36.
Boston and Albany R. R. Co. v. *O'Reilly*, 158 U. S., 334.

The comment of the judge was not an expression of opinion to the jury but a statement made in ruling out a request by the defendant to use the duplicates when a question was asked relating to the vessel's position. There was no objection or exception as to the correctness of the ruling. (Rec., p. 52.) Under the circumstances in which Bram admitted these duplicates were made they were not competent to refresh his memory in regard to the position of the vessel. They were not the original entries in the log book, nor was it claimed that they were even copies of the original entries. (*Putnam* v. *United States*, 162 U. S., 687.)

Error No. 24.—Bram's counsel on redirect examination of defendant (Rec., p. 53) proposed to introduce certain letters of recommendation which, Bram stated, were from former employers and which, he further stated, he had shown to Captain Nash at the time he contracted for service on the *Herbert Fuller*. Under objection by the Government, these letters were excluded. There is no rule of evidence upon which these letters, under the circumstances, were admissible. The contents of the letters, so far as this case is concerned, are unknown; but they are called letters of recommendation. They are no part of any conversation or transaction between Bram and Captain Nash introduced in evidence by the Government. It will be seen that the suggestion that the defendant misled the Captain came from the defendant's counsel at the time these letters were offered, and not from the prosecution. Bram testified that he told Captain Nash he came from Nova Scotia, and Bram explained how he hailed from there. The defendant's offer of proof did not tend to contradict this. These letters at most were the mere declarations of outsiders—persons unknown to the court and the jury, and whom counsel for the prosecution had no opportunity to examine. They were only hearsay.

Error No. 25 and Error No. 26 involve the same point, viz, that the court erred in permitting witnesses Loheac and Monks, in rebuttal, to testify as to the size of certain vomit seen by these witnesses on the deck of the vessel shortly after the murder. Loheac said: "It was about as large as the top of a spittoon." Monks said: "I think there was a good deal."

The plaintiff in error does not seem to have relied on this exception, but, as it is here presented in the substituted assignment of error for the consideration of the court, it is submitted that the order of testimony in a trial is in the discretion of the court, that this testimony was proper in rebuttal. On direct examination of Loheac, and elsewhere in the Government's case in chief, testimony as to the defendant's action near in time was allowed without objection, and it appeared that the defendant vomited and slipped into the vomit, wiping it up with his pants. The defendant, both on his direct examination and on his cross-examination, testified as to the size of the vomit, his denial taking the form that the vomit was small and wiped out by his slippers. It was then proper to allow in rebuttal evidence to contradict the evidence on which defendant's denial was based.

Goldsby v. *United States*, 160 U. S., 70.
Com. v. *Goodhue*, 154 Mass., 487.
Com. v. *Morgan*, 159 Mass., 375.

Error No. 23.—The error assigned is that the court permitted the witness Parker to testify in rebuttal how long it would take to go from Cayenne to Buenos Aires, as follows: "Not less than seventy-five or eighty days." (Rec., p. 56.)

The objection of defendant to this testimony seems to be based upon the ground that witness was not qualified to answer—that, although witness was a skilled navigator, he could not answer the question unless he had made the voyage between the points named. Parker was shown to be a seaman of forty-two years' expe-

rience at sea, thirty-five of which he had served as captain. He was certainly qualified to testify upon this point, whether he had made the voyage or not. He knew the distance, he knew the rate of speed that a vessel like the *Herbert Fuller* could travel, he knew what effect the ordinary changes and conditions of wind and weather would have upon the speed of the vessel. This was knowledge from experience and practice, which peculiarly fitted him to enlighten the court and jury upon these points.

It will be seen (Rec., p. 56) that, although witness had not sailed from Cayenne to Buenos Aires, he had sailed from Boston to Buenos Aires, from Boston to Cayenne, and from New York to Cayenne.

The Record (p. 23) shows that—

> At first after the discovery of the murders there was some hesitancy as to where the vessel should go. At the defendant's suggestion she was headed to go to Cayenne, in French Guiana, but the plan was changed and she steered for Halifax, Nova Scotia, where she arrived July 21.

At the time of the murders the *Herbert Fuller* was in about latitude 36° north and longitude 53° west. Bram suggested that she should be headed to Cayenne, in French Guiana, claiming that that was the nearest port toward her destination, viz, Rosario, via Buenos Aires. Buenos Aires is situated at the mouth of the Rio de La Plata, on the southeastern coast of South America in the Argentine Republic. French Guiana is north of Brazil and in the most northern part of South America. Rosario, the destination of the vessel, is in the ~~northwestern~~

portion of the Argentine Republic and is inland, near the Plate not far above Buenos Aires on the Rio de the range of mountains which divides Chile from the Argentine Republic. From the location of the vessel at the time of the murders, Cayenne was not the nearest port toward its destination, viz, Rosario, via Buenos Aires. In fact, it was entirely out of the line of the voyage. The court will see the importance of this testimony in the light of Bram's testimony and other facts connected with what he said and did after the murders.

Error No. 28.—Based on question and answer of Lester H. Monks, who was called in rebuttal:

> Q. When you and the mate, Bram, went down into the cabin—when you first called him and he went down with you into the cabin, what, if anything, did he do in regard to the captain's feet?
>
> A. He didn't go anywhere near the captain at all.

Upon examination it will be seen that Bram himself testified to this same fact on his direct examination. The principle involved, however, is fully discussed under error No. 25.

Error No. 29 is the same. Also 30, 31, and 32. The bill of exceptions shows that the matter referred to in error No. 32 was testified to by Bram on his direct examination. The subsequent statement in the bill that he did this for the first time on his cross-examination is a mistake.

Error No. 33.—The basis of this assignment will be found beginning on Record, page 58, as follows:

> The district attorney, in his closing argument to the jury, said: "He (referring to the defendant) says that Charlie Brown could leave that wheel. I

say he could not. They have produced a lot of sea captains to say that he could leave the wheel. I put on Mr. Cutler, who was a mate on that vessel, and if you can argue from the nonproduction of witnesses, can you not argue from the failure to put questions?"

Counsel for the defendant at this point said:

We except to that evidence—evidence excluded by the court and called out of order. We submit it is not proper and we except to that branch of his argument.

Webb, J., said:

The facts are before the jury—the fact of the calling of the witnesses.

The district attorney then said:

I withdraw that. That may be stricken out.

Attention is called to the charge of the court which immediately follows this (Rec., p. 59):

You are not to be governed by arguments of counsel beyond that degree to which they commend themselves to your own understanding and your own intelligence. You are not to be affected by any admissions or statements made by counsel in opening or closing, but you are to be governed by the evidence and the law. You are not to be affected by any supposed indication of an opinion of the court, or if an opinion had been directly expressed to you by the court you would have no authority to accept it in substitution for your own independent, original, careful determination on the matters yourselves. But in so far as you find the arguments of counsel supported by the evidence and by sound reasoning compatible with the common knowledge of mankind, in so far you will respect them. But you are the

final arbiters of the evidence and of the fact under the law as the court shall give it to you.

The district attorney's remark in itself was not unjustifiable nor prejudicial under the circumstances. He did not refer to any testimony which was not before the jury. He did not refer to any testimony which had been ruled out by the court. He only said, "If you can argue from the nonproduction of witnesses, can you not argue from the failure to put questions?" This was evidently in response to the argument of defendant's counsel that the Government had failed to produce witnesses to contradict the theory of the defendant based upon the evidence of the sea captains he had introduced.

Cutler, an experienced man, who had been mate upon this very vessel, was introduced by the Government and was asked (Rec., p. 58) as to what was the proper position of the mate at night on board the vessel. Upon objection of defendant this was ruled out. The suggestion of the district attorney could only have the effect to call attention to the fact that here was a witness familiar with the vessel—a man of experience—who was competent to testify upon that point, and defendant's counsel not only objected to his giving testimony on direct examination upon the point, but, when he was upon the stand, failed to ask any questions upon this line of inquiry. This was as legitimate argument as the argument on the other side that the Government had failed to produce witnesses; especially in view of the testimony of Cutler which was admitted by the court (Rec., p. 58) which was as follows:

Q. Have you ever steered the *Herbert Fuller?*

A. Yes, sir.
Q. How did she act?

This, as will be seen by the record, was objected to by defendant's counsel. So when the Government was attempting to reply to the testimony of the sea captains introduced by defendant by the testimony of a witness who had steered the *Herbert Fuller* and knew how she acted and where the proper position of the mate was at night, the defendant's counsel objects, and the Government is not permitted to do so; and the district attorney's remark to the jury was based upon this incident of the trial, which occurred in the presence of the jury. The district attorney argued no fact outside of the evidence. He merely called attention to an incident which occurred in the presence of the jury in the course of the trial. The remark made by the judge only referred to this incident. He said when objection was made by counsel for defendant, "The facts are before the jury. *The fact of the calling of the witnesses.*" In other words, he said that there was no fact proved by the witness, Cutler. There was nothing before the jury from his testimony except that he had been aboard the *Herbert Fuller* and had steered the vessel; that the only other fact in connection with Cutler was that he had been called as a witness and placed upon the stand by the Government.

Further, the remark was at once withdrawn on objection made, and the court in the charge warned the jury not to regard the argument. Hence, no error.

Dunlop v. *United States*, 165 U. S., 486.
Hinton v. *Railroad*, 65 Wis., 323.
United States v. *Wilson*, 69 F. R., 588.
State v. *Degonia*, 69 Mo., 485, 490.

But this assignment can not be considered, for, as the record shows (p. 59), no exception was taken at the time and consequently can not be inquired of in the court here. Defendant's counsel is not only required to call the attention of the court at once to the remarks of the district attorney which were objectionable, and to request the court's interposition, but, in case of refusal, to note an exception; unless he does this, an assignment of error is untenable.

Crumpton v. *United States*, 138 U. S., 361.
Lewis v. *United States*, 146 U. S., 370.
Chandler v. *Thompson*, 30 F. R., 38.
Com. v. *Poisson*, 157 Mass., 510.
Learned v. *Hall*, 133 Mass., 417.
Powers v. *Mitchell*, 77 Me., 361.
State v. *Degonia*, 69 Mo., 485.

And the same rule applies as to the remark of the judge if the same should be held improper. The defendant's counsel did not even enter an objection to that at the time. (Rec., p. 59.)

Error No. 34.—The question of the court was no interference with the rights of the defendant nor prejudicial to his interest. It was simply in the interest of truth. It was only intended, and only had the effect, to elicit a fact which was competent to go the jury in the trial of this cause. There is no rule of law or of propriety which forbids a judge to ask a question of a witness on the stand for the purpose of eliciting important facts pertinent to the inquiry. How could this question prejudice the defendant? The answer of the witness could have been favorable or unfavorable. The court did not

know. The purpose was to have the truth go to the jury, whether it affected the prosecution or the defendant. Here is the question (Rec., p. 60) which was propounded to the witness, Loheac, by the court:

> When the vessel was allowed to fall off or come up in the wind from any cause, would a person upon the deck know the facts?
>
> A. Yes, sir.

The pertinency of this question, based upon other facts and the theories advanced by the Government and the defendant, can be readily seen. Bram was upon the deck. It was certainly competent to inquire whether the effects upon the vessel arising from a certain condition would be known to him when this condition could only be brought about by the action of the one other person who could be charged with the murder. It is nowhere claimed by the defendant that he observed any change in the behavior of the ship during his watch on the night of the murder. Then this testimony, which was given by an expert sailor, tended to show that there could be no change in the position of the man at the wheel.

But there was no objection or exception taken at the time. (Rec., p. 60.) Hence it is not reviewable.

Error No. 35 (Rec., p. 60).—This assignment and the principles involved will be compared with matters under Error No. 23, *supra*, and also under Error No. 37, *infra*. No exception was taken at the time. See authorities on this point *supra*.

Error No. 36.—This assignment is based upon a remark of the court when an objection was made by the district attorney to the argument of defendant's counsel.

Defendant's counsel asserted that there was a mysterious arrangement by which Charlie Brown was sent before the grand jury and Bram was not. The district attorney objected to this, whereupon the counsel for the defendant said:

> I say there is a discrimination between these two men, and I have a right to argue, from that discrimination, that there is a mysterious arrangement.

This assertion was made in the colloquy between the counsel and the court which followed the district attorney's objection, and it was then the judge said:

> It is farfetched, but we do not propose to interfere.

The counsel for the defendant was indulging in an assertion which was a reflection upon the good faith of the Government in the prosecution. He was making an assertion which was without authority and without basis in fact. He was charging that some "mysterious arrangement"—some arrangement not authorized by law; some arrangement which was improper and unjust; that one man had been sent before a grand jury and another had not. The judge's characterization of this assertion, under the circumstances, was not only warranted but deserved. No objection (Rec., p. 63) was made to the remark by defendant's counsel at the time, and no exception taken. (See discussion of this principle *supra*.)

Error No. 37.—This assignment is based upon exception to the charge of the court (Rec., p. 63). The record is as follows:

> At the conclusion of the charge to the jury counsel were asked whether they excepted to the in-

structions—to anything included in or omitted from them. The reply was that the charge was entirely satisfactory. The counsel for the defendant then presented a paper claiming an exception of the most indefinite character to all objectionable and prejudicial matter.

Such an exception presents no question for the decision of this court.

Hanna v. *Maas*, 122 U. S., 24.

Thiede v. *Utah*, 159 U. S., 510, 520, 521–2, and cases cited.

Worthington v. *Mason*, 101 U. S., 149.

St. Louis, etc., Railway Co. v. *Spencer*, 71 F. R., 93, 95, and cases cited by Sanborn, J.

The exception was too late. It was too general. It assigned no grounds.

Chateaugay Ore and Iron Co. v. *Blake*, 144 U. S., 476.

Patrick v. *Graham*, 132 U. S., 627.

The alleged error relied on in this assignment is a general exception not only to the charge, but is an attempt at rehearsal, after the court had charged the jury, of all the matters which occurred during the trial. The exception by defendant's counsel under this assignment is, in substance, as follows:

> To all objectionable and prejudicial matter, whether it was elicited by the Government or the court, and all statements of fact and opinion, and examination of witnesses by one member of the court during the trial, which said matter, statements of facts and opinion, and examination of witnesses more specifically

appear in the official stenographic report of said trial, etc.

This was a wholesale exception, and was presented after defendant's counsel had announced that the judge's charge was satisfactory. It appears to be a mere afterthought. An exception in bulk to a refusal to charge several propositions can not be maintained. A general exception to the charge does not present a question that this court will consider. (See authorities cited *supra*. Also *Holder* v. *United States*, 150 U. S., 91.)

Error No. 38.—Based on charge (Rec., p. 63).

The court, in giving instructions to the jury in regard to their duties, read from one of the leading cases on the subject, as follows:

> "The only mode provided by our Constitution and laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty can not be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet in order to bring twelve minds to a unanimous result you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, and that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evi-

dence will be produced on one side or the other. And with this view it is your duty to decide the case if you can conscientiously do so. But in conferring together you ought to pay proper respect to each other's opinions, and listen with a disposition to be convinced to each other's arguments. And, on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath.

And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

I think, gentlemen, what I have said sufficiently answers the communication which you made to the court. You will, therefore, retire for further consideration of this case.

In *Pointer* v. *United States*, 151 U. S., 396, 416, the court (Justice Harlan) say:

> If, in charging a jury, a judge chooses to employ the words of others in order to convey the exact thought in his own mind, or if he prefers for purposes merely of illustration to read from the opinions or judgments of other courts, we can not hold that such practice, although not to be encouraged,

is, in the absence of a statute prescribing a different rule, ground for the reversal of the judgment of the trial court.

If the instructions of the court followed the law, how can it prejudice the defendant, whether such instructions were delivered orally, read from manuscript, or quoted from authors or decisions of courts? The defendant's counsel has entered no objection that the instructions were not the law, but the assignment of error is based upon the fact that the judge read the instructions from one of the leading cases on the subject. It was a proper instruction, and Pointer's case decides the judge's right to read it, if he elected. There are plenty of authorities sustaining the law as set forth in that which was read by the judge.

Com. v. *Tuey*, 8 Cush., 1.
Allen v. *United States*, 164 U. S., 492.
Allis v. *United States*, 155 U. S., 117.

Errors Nos. 39–67.—Assignments of error Nos. 39 to 67, inclusive, are based upon the action of the court upon defendant's motion for a new trial. The denial of a motion for a new trial can not be assigned as error.

Moore v. *United States*, 150 U. S., 57.
Holder v. *United States*, 150 U. S., 91.
Blitz v. *United States*, 153 U. S., 308.
Wheeler v. *United States*, 159 U. S., 523.

These cases are all cited and approved in *Chune* v. *United States*, 159 U. S., 590, 591.

In all the exceptions upon which defendant based his motion for a new trial he relied on *Mattox* v. *United States*, 146 U. S., 140, and cases therein cited.

The action of the judges in the court below in overruling defendant's motion for a new trial and the rulings thereon of the court were in strict accordance with the principles laid down in the Mattox case, upon which the defendant relies. The court exercised its discretion in respect of the matter stated in the affidavits which were presented upon the motion for the new trial. The rulings of the court, beginning on record page 105 and continuing and including part of page 112, are full and explicit and meet every proposition involved in the motion for a new trial and defendant's request for findings (Rec., p. 105) as referred to in the motion.

Assignments of error from 39 to 63, inclusive, are based upon the conduct of or interference with the jury or individual members thereof.

The thirty-ninth and fortieth are based upon the refusal of the court to permit the witness, Jack, one of the jurors, to testify in regard to conversation with two others of the jurors, Booth and Briggs, during the progress of the trial, one of said conversations being with Booth in reference to where he obtained a certain paper, the presence of which in the jury room was one of the grounds alleged in the motion. The other conversation was with the juror, Briggs, relative to the defendant.

The testimony of Jack will be found in Record, page 68, and the specific exception on page 72.

The same question is involved in assignment No. 41 as to question to witness Bean. (Rec., p. 75.)

Under assignment of error No. 42 (Rec., p. 76) the court ruled upon these several questions and says:

> We have admitted in this case the affidavit of Mr. Connell, as to what one of the jurors said previous to the trial of the case, which would relate to the question of whether he had prejudged the case or not. Any further evidence, which relates to what the juror said, will also be received by the court, but any expression of opinion after the trial that any of the jurors may have made to third parties, as to his state of mind during the progress of the trial, or as to his state of mind at the conclusion of the trial, the court will reject upon grounds of public policy.

Error No. 43 is based upon the exclusion of the affidavit of Bean (Rec., p. 77). This affidavit is directly in the face of the ruling of the court.

Assignments of error 44, 45, 46, 47, 48, 49, 50, and 51 are all based upon the refusal of the court, after the verdict, to permit a member of the jury to testify as to a conversation with another member of the jury during the trial. In other words, these are all based upon the refusal of the court to permit one juror, after the rendition of the verdict, to which he had agreed, to impeach the conduct of another juror during the progress of the trial. It is a general rule that jurors can not be permitted to impeach the verdict to which they have assented and in which they have concurred. In *Woodward* v. *Leavitt* (107 Mass., 453), Judge Gray, speaking for the court, said:

> The proper evidence of the decision of the jury is the verdict returned by them on oath and affirmed in open court. It is essential to the freedom and

independence of their deliberation that their discussion in the jury room should be kept secret and inviolable, and to admit the testimony of jurors as to what took place there would create distrust, embarrassment, and uncertainty.

See also *Chadbourn* v. *Franklin*, 5 Gray, 312, 315.

One juror can not as a part of the defendant's case in chief, for disturbing the verdict, testify as to conversation with another juror about the defendant during the trial. Partiality and misconduct of the jury in the jury room can not be shown by the testimony of the juror himself or by other jurors.

Cook v. *Custner*, 9 Cush., 266.

See also:

Com. v. *Meserve*, 156 Mass., 61.

This latter case citing *Woodward* v. *Leavitt* (107 Mass., 453), which was approved in *Mattox* v. *United States* (146 U. S., 140).

See also:

Com. v. *White*, 147 Mass., 76.
United States v. *Daubner*, 17 F. R., 793.
Chandler v. *Thompson*, 30 F. R., 38.
Hannum v. *Belchertown*, 19 Pick., 311.
Rowe v. *Conney*, 139 Mass., 41.

The court heard upon the motion for a new trial by defendant, based upon the suggestion that jurors were not impartial, the affidavit of Coffin (Rec., p. 67), the affidavit of Connell (Rec., p. 67), and the testimony of Bond (Rec., p. 95). This was the testimony upon which defendant alleged that Juror Ford and Juror Briggs had made declarations prejudicial to defendant anterior to the

trial. The affidavit of Bond, which is by far the strongest indication of an expression on the part of the jury anterior to the trial, does not state a fact which would disqualify a juror. Admitting that Briggs said what Connell says, viz:

> There isn't the least doubt but things are looking bad for Bram, and I believe he is guilty.

This would not disqualify the juror if he afterwards testified on his *voire dire* that he stood indifferent. It has been held in many cases that although a juror, from reports in newspapers and other sources of information, has anterior to a trial in a capital case formed and expressed an opinion upon such reports that the prisoner at the bar is guilty, still if the juror states upon oath, when called, that notwithstanding such opinion he can hear the testimony and render an impartial verdict, he is not disqualified.

The testimony of Bond is too indefinite to be considered. Bond testifies that he made the statement (Rec., p. 95) himself, and says:

> As I remember it, he (Briggs) thought as I did.

But the juror Briggs (Rec., p. 99) swears directly and emphatically in contradiction of the statement of Connell. The affidavit of Coffin (Rec., p. 67) alleges that the conversation with the juror Ford took place after the trial, in which Ford stated that he, Mr. Ford, "said before the trial of said case that the defendant, Bram, ought to be hung." The juror Ford, when called, testifies that he had no such conversation. (Rec., p. 96.) The

court considered the facts involved in the foregoing affidavits and oral testimony and concluded that the allegations against the two jurors were unfounded. The widest scope was given the defendant by affidavit and oral testimony to show, if possible, that any juror who was engaged in the trial had by anterior conduct or declarations disqualified himself for this duty. After he had produced all of the evidence which could be had upon this proposition, he signally failed, and the court held, upon consideration of the affidavits and the oral testimony introduced by defendant, and the testimony in contradiction, that the charge against the two said jurors had not been supported.

In this case every juror was examined on the *voire dire* before being sworn to try the indictment, and counsel for the defense as well as for the prosecution had the privilege of further examination. At that stage of the proceedings every juror sworn in the case was properly qualified, and no challenge, either peremptory or for cause, being introduced, he was placed upon the panel. It was only after the verdict had been recorded that anything was heard of the present objection. In support of the objection evidence both oral and by affidavit was produced. On the other hand, the jurors alleged to have been disqualified appeared before the court and denied the accusations against them, and nothing was found to impeach the integrity of either of the jurors or to disqualify either for the duty of sitting in the cause.

Error No. 32 is based upon the exception to the testimony of James C. Ruhl, one of the bailiffs who was in

charge of the jury during the trial. (Rec., p. 91). The question propounded by the district attorney to Mr. Ruhl was as follows:

> Was there any communication between the waiters and the jurymen?

His answer was:

> No, sir.

This was a proper inquiry which had been opened during the investigation by the suggestion of defendant's counsel that waiters were permitted to enter the room of the jury. It was shown that waiters had gone into the room where the jury was for the purpose of carrying food, and doing other service in the capacity of waiters. It is further shown that the officers were present all the time the waiters were there. On page 91 of the Record the statement made by defendant's counsel is as follows:

> We claim, if your honor please, the significant fact is that strangers or foreigners—people, I do not mean under the sense of another nationality, because that might apply to me, but people who did not belong in that jury room—that they were there.

This statement was made to the court at the time when the Government was offering to prove by Ruhl that there was no communication between the jurors and the waiters who had entered the room for the purposes before stated. This testimony was proper and material to show the harmlessness of the presence of the waiters.

Nichols v. *Nichols*, 136 Mass., 256.
Com. v. *Roby*, 12 Pick., 496, 516.
People v. *Gaffney*, 14 Abb. Pr., N. S., 36.
People v. *Hartung*, 8 Abb. Pr., 132.
United States v. *Gibert*, 2 Sumn., 19.

Error No. 53.—This is based upon the refusal of the court to permit the defendant's counsel to ask the witness Jack (a juror) the following question:

> In the presence of all the jurors, and before the case was submitted to them, before the charge was delivered, did Mr. Briggs state that he made Masonic signs to the defendant and that he did not respond?

Errors Nos. 54 and 55.—Assignments 54 and 55 are of precisely the same character.

The principle involved in this assignment is of like character as that heretofore discussed, viz, the propriety of accepting the testimony of one juror concerning the conduct of another juror during the progress of a trial. (Rec., p. 94).

And here the attention of the court is called to the fact that upon this point no evidence from others than members of the jury was offered. After the juror Briggs had been upon the stand to testify in response to alleged disqualifications as a juror, and after defendant's counsel had had an opportunity to cross examine and failed to call his attention to the matters involved in the question propounded to Jack, or to ask him in reference thereto, and after defendant's counsel had based his motion in chief upon affidavits and oral testimony heretofore referred to, the proposition was, by the question to Jack, to show an entirely new ground upon which to attack the verdict of the jury. There was nothing to show that Briggs did make any signs to the defendant or declarations to the juror, except as suggested in the questions

propounded by defendant's counsel. If it were competent at all to go into an examination of this character, it should have been done at the outset as a part of the defendant's motion in chief. The attention of Briggs should have been called to it while upon the stand, in order that he might have an opportunity to admit or deny it. It would have been unfair to the juror and unfair to the court to permit the defendant, after he had presented the evidence upon which he based his motion in chief, and after the Government had been heard in reply, to introduce new witnesses and offer new testimony upon a different subject in support of his motion.

Error No. 56.—Is an exception to the ruling of the court permitting the Government to introduce testimony in reply to that introduced by the defendant in support of his motion, and specifically in permitting the witnesses Ford and Briggs to testify. It would be a strange rule which would confine the court, upon a motion for a new trial based upon affidavits and oral testimony as to prejudgment and misconduct of jurors, to the testimony offered by the party making the motion. If this was the law, any party to a suit dissatisfied with the verdict could, by the production of *ex parte* affidavits and testimony, procured from affiants and witnesses, without opportunity of examination or investigation at the hands of the adverse party, and without the right to the adverse party of reply, set aside the verdict of a jury. It is impossible to see the reason for this assignment. It is well settled that, where a motion for a new trial is

based upon an alleged prejudgment of jurors, the jurors themselves can be called to deny prejudgment or to explain their statemant on the *voire dire*.

Haskell v. *Becket*, 3 Greenl., 93.
Taylor v. *Greely*, 3 Greenl., 204.
Sawyer v. *Hopkins*, 22 Me., 268, 285, 287.
Thrall v. *Lincoln*, 28 Vt., 356.
Blackburn v. *State*, 23 O., St., 146, 165.
United States v. *Wilson*, 69 F. R., 584.
Woodward v. *Leavitt*, 107 Mass., 459, 471.

Error No. 57.—The fifty-seventh assignment of error is based upon the several rulings of the court at the close of the evidence upon a motion for a new trial. This is really an exception to the decision of the court overruling the motion for a new trial. The decision overruling a motion for a new trial can not be reviewed. Although this question has been discussed heretofore in this brief, the attention of the court is again called to the authorities cited on that point. The fact stated in the affidavit of Juror Booth (Rec., p. 65) in regard to the paper found in his hat is referred to, and this is relied upon by defendant's counsel as sufficient to set aside the verdict on the ground of extraneous influence. The affidavit states in substance that Harrington, a deputy marshal who had at times assisted the two bailiffs who had charge of the jury, approached Booth as the jury was passing from the court room through the hallway and said to him privately, "Look in your hat," which was at that time in the jury room on a hook, the number of the hook corresponding with the number of the juror's seat in the panel. Upon reaching the jury room the juror looked at his hat and

found tucked in its band a slip of paper on which was written the following:

> Would you like a ½ pint? If so, give me the tip Sat. morning. I will put it in your pocket. Red.

The juror did not act upon the hint but at once exposed the deputy to the foreman of the jury. There is no suggestion that this occurrence in any way affected the juror's opinion or action in the case. There is no reasonable ground on which to conclude that it did. The deputy, although his conduct may have been reprehensible, in no way represented or pretended to represent the prosecution, or to have any interest adverse to the defendant. The paper made no suggestion or intimation in regard to the case. It was merely an offer to furnish the juror something, presumably liquor, if the juror would request it. The paper itself is produced in court attached to Booth's affidavit, and on inspection proves to be entirely harmless.

It is further insisted that the verdict should be set aside because of the finding of a newspaper by one of the jurors during the progress of the trial. The facts in regard to the newspaper are in substance as follows:

A newspaper was found in the elevator by one of the jurors as he and his associates were passing from the court room to their boarding house. The evidence is that he did not even notice the name of the paper, but was told it by one of his fellows who saw it as he picked it up and put it in his pocket; that he never opened it or looked into it, nor passed it to any other juryman; that, though sorely tempted to read it, he reflected that

to do so would be wrong, and he thereupon delivered it the officer in charge of the jury.

In *United States* v. *Reid*, 53 U. S. (How. 12) 361, the court say that the fact that two jurors while empanneled in the case read a newspaper report of the preceding evidence, but which had no influence on their verdict was not sufficient ground for a new trial. In this case the newspaper referred to is not claimed to have had anything in reference to the trial, and the juror did not, in fact, nor did any of the jury, read it at all. While considering the case last cited, the attention of the court is called to the cases referred to in Note 1, in which it is held that the affidavits of jurors can not be read to show mistake, miscalculation, or misconduct on the part of the jury. The burden is not on the Government to show that the paper found in Booth's hat and the newspaper found in the elevator were harmless. And if it were, the papers themselves and the facts connected with them prove conclusively their harmless character.

Errors Nos. 58, 59, 60, and 61.—Assignments of error 58 and 59 are the same as has just been discussed, and the matters involved in assignments of error Nos. 60 and 61 have already been discussed.

Error No. 62 is assigned as follows:

> The court erred in finding as a fact that the jurors called denied the evidence of bias.

The jurors each swore positively, directly contradicting the statement contained in the affidavits and oral testimony offered by defendant. The allegation of bias was based upon these affidavits and oral testimony. Then, if the

court found as a fact that the jurors had not stated what was alleged in the affidavits and oral testimony offered on the part of the defendant, there could be no error in holding that the jurors denied the evidence of the bias, because this is precisely what the two jurors did.

Error No. 63 involves only matters which have been heretofore referred to. As affecting the conduct of the jury and as a ground for a new trial the defendant offered the affidavit of Juror Harry J. Booth (Rec., p. 66), in regard to an experiment said to have been made in the jury room for the purpose of ascertaining whether a man at the wheel of the *Herbert Fuller* could look in at the window of the chart room of said vessel and see anything there. This experiment and the manner of its application is fully set forth in Booth's affidavit. The experiment was not in the nature of evidence. It was not evidence. It did not bring to the knowledge of the jury any new facts or any facts other than those testified to by the witnesses on the stand.

The witnesses had testified as to the size of the ship; a chart had been shown of the different parts of the ship. Charlie Brown had testified that he was at the wheel and looked through the window of the chart room where the captain was and saw Bram strike the captain. Now, with the position of the wheel given to the jury, with the position of the chart room, of the window, and the position of the man at the wheel, the jury simply undertook, to illustrate, in a practical form, the testimony of the witnesses. Certainly, in the deliberations of a jury, the jurors have a right to discuss the bearing of testimony, the effect of testimony, and the application of testimony

to the practical affairs of life. Indeed, this is not only the province, but the duty, of the jury. Now, how could the experiment which was made by the jury as described by Booth be regarded as conduct beyond their powers or prejudicial to the defendant? There is no rule prescribed which directs the manner or the order in which a jury shall consider the evidence in making up a verdict, and the courts will not undertake to enter the precincts of the jury room and disturb their deliberations in this respect.

As to the argument of the defendant's counsel that this experiment was not in the presence of the defendant, and that he had no opportunity to control, explain, or vary it, the same argument will apply to the entire deliberations of the jury. Upon this principle, if followed out, it would be ground for a new trial that the defendant was not present in the jury room to control, explain, or vary any hypothesis suggested in the deliberations, or any line of reasoning or argument advanced by one or more of the jurors. The defendant, through his counsel, was afforded ample opportunity in the argument to the jury, before they retired, to present whatever view might be entertained which might control, explain, or vary any evidence offered in the case.

The case of *Railroad Company* v. *Lee* (46 N. E. Rep. 543) makes no reference to the action of the jury. That only refers to the competency of a witness who did not see a certain railroad accident, but who went to the scene immediately afterwards, to illustrate to the jury what he had shown to others how the accident might have happened.

Nor is the case of *Stokes* v. *State* (5 Bax., Tenn., 619) a case in point, and the opinion in *Jim* v. *State* (4 Humphrey, Tenn., 289) is based upon the fact that the jury experimented with a constable on the outside of the jury room. There is no person other than the jury who took any part in the deliberation in this case, or was called upon to take any part in the deliberations or the method of considering testimony in order to determine its weight or value in arriving at a verdict.

The incompetency of the testimony of a juror to impeach the verdict, by disclosures of what took place in the jury room, has been discussed under "*Errors No. 43 to 51.*"

Errors 64, 65, 66, and 67.—We come now to errors Nos. 64, 65, 66, and 67. These are all based upon the refusal of the court to set aside the verdict and grant a new trial upon the ground of newly discovered testimony. The basis of this motion by defendant's counsel is to be found in the affidavits of Spencer, Messenger, and Downey, pages 113–116 of the Record. These affiants give an account of an experiment which was made by them, or others in their presence, on board the *Herbert Fuller* after the trial by locating themselves at the wheel and placing objects in the after cabin, and making a light, and afterwards arranging the vessel as they understood it from the testimony to be on the night of the murders, and thus preparing themselves to testify in contradiction of the evidence of the witness Charlie Brown, the sailor, and to show by this experiment that Brown could not, standing at the wheel as he described in his testimony, see what he alleged he saw take place in the after cabin.

The defendant had already introduced testimony upon this line to the jury during the trial. The importance of this testimony was well understood by him and his counsel. In no sense can the facts set up in these affidavits be considered newly discovered testimony. It was merely cumulative and corroboratory of previous testimony, and especially that of Bram, that a man at the wheel could not see Bram strike the captain in his cabin, and the suggestion of the court, in disposing of the motion, that the defendant showed *laches* in not being prepared with this evidence at the trial was, under the circumstances, justifiable.

There is no allegation incorporated in the bill of exceptions that the rights of the defendant were prejudiced for the want of this testimony. There is no absolute rule requiring the court to award a new trial on the ground of newly discovered testimony. It is a matter within the discretion of the trial judge.

The court found as a fact that the evidence set forth in the affidavits was not newly discoverable, but was cumulative. This was a finding of fact and not reviewable.

Upon the assignments of error based upon the alleged newly discovered testimony, the following cases are cited:

State v. *Ray*, 53 Mo., 345.
People v. *Sup. Ct., N. Y.*, 5 Wend., 114.
Gardner v. *Gardner*, 2 Gray, 434.
Lowry v. *Railway*, 68 F. R., 827.

The foundation of the brief of the plaintiff in error is an attack upon the attitude of the trial judge, Webb, attempting to ascribe to him conduct based upon preju-

dice toward the prisoner. It is entirely appropriate, therefore, to close the brief of the Government by printing an extract from his opinion denying the motion for a new trial, which is to be found in the Record, pages 110–112.

> The alleged prejudice of the defendant's rights by questions, expressions, and interruptions by one of the judges engaged in the trial, next invites attention.
>
> This objection to the verdict is pressed with much earnestness and apparent sincerity. In every instance that the defendant's attorney expressed to the court his dissatisfaction the expression or the question objected to was withdrawn. Upon the hearing of this motion it has been assumed that such withdrawal was prompted by a consciousness of some error, an assumption which is unwarranted. In some instances no objection to the question or the action of the court was made. If in pressing this motion it is contended that an expression of hostility to, or at least prejudice against, the defendant was manifested, a more careful examination of the record will, we believe, disabuse the minds of the counsel on this point. The questions to the medical experts which are specified were suggested by the position taken by the defense and grew out of it. The examination of his experts by the district attorney did not cover the whole ground taken by the defense, and the questions by a member of the court only supplied that omission. The remark which was addressed to counsel about the loose sheets of paper which the defendant called a duplicate of the log book, out which the evidence showed was not a duplicate, but something else, was not a misstatement of fact, but grew out of the conten-

tion of counsel as to whether the witness should be permitted to refresh his recollection as to the course the vessel was sailing, not only from the log book, which was handed to him, but from memoranda subsequently made by him, which were not copies of the log book. Upon objection by defendant's counsel the court at once directed that every remark made be stricken out.

The questions which were asked during the cross-examination of Sprague, an expert witness called by defendant, about the helm, were proper. Only the last of these questions was objected to, when it was withdrawn and the district attorney was forbidden to repeat it.

There was an interruption by the district attorney of the argument of counsel for defendant, where he was commenting on the examination of the witness Brown before the grand jury and the nonexamination of Bram. The argument was that there had been some "mysterious arrangement" for this proceeding on the part of the district attorney. The court, or one member of it, remarked that the argument was "far-fetched," but the argument was allowed to proceed. Strictly, the argument imputing as it did some "arrangement" on the part of the prosecution was not only far-fetched, but unjustifiable. It accused the Government attorney of impropriety and abuse of his official position. The fact of calling Brown and not calling Bram before the grand jury was open to discussion and criticism in so far as it is evidenced an unfavorable discrimination and prejudgment against the defendant. It did not warrant the impeachment of the officers of the United States of the wrong of contriving or combining or colluding with anyone or in any way to injure the defendant. But waiving all discussion of the reason for the expression of the judge in this

and other instances, these objections proceed upon the unsound theory that a judge has no duty in the trial of causes except to keep order and hold counsel within the rules and the law. This theory would require a judge to stand by and silently permit carelessness, forgetfulness, oversight, or inexperience, or superior tact, or astuteness to defeat justice and right.

* * * * *

There remains for consideration only the general argument that the verdict is against the evidence and the weight thereof.

The authorities are very numerous which define the proper action of courts in reversing verdicts of juries as against evidence. The principle expounded by them may be summarily stated to be that when there is evidence in the case, which, if believed by the jury, would warrant their verdict it must stand, notwithstanding the fact that the court might have decided differently. There was such evidence in the present case, and in the light of the great preponderance of authority on this point the court can not disturb the verdict given by a jury who showed themselves conspicuously patient and attentive during a long and wearisome trial. *Moreover, in justice to the jurors compelled to engage in a most unpleasant and responsible duty, we are impelled to say that we do not see how any intelligent, conscientious, and painstaking jury having listened to the whole trial and having seen the various witnesses, could have reached any different verdict.*

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